

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JASON MOOMJY, Individually and On Behalf
of All Others Similarly Situated,

Plaintiff,

v.

HQ SUSTAINABLE MARITIME
INDUSTRIES, INC., NORBERT SPORNS
and JEAN-PIERRE DALLAIRE,

Defendants.

Case No. 2:11-cv-00726-RSL

CLASS ACTION

MOTION OF THE TRIGON EMERGING
AGRI-SECTOR FUND FOR
APPOINTMENT AS LEAD PLAINTIFF
AND APPOINTMENT OF LEAD
COUNSEL; MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
THEREOF

NOTE ON MOTION CALENDAR:

Date: July 15, 2011

ORAL ARGUMENT REQUESTED

The Trigon Emerging Agri-Sector Fund (the “Trigon Fund” or “Movant”) hereby moves this Court, pursuant to Section 21D(a)(3)(B) of the Securities Exchange Act of 1934 (the “Exchange Act”), as amended by the Private Securities Litigation Reform Act of 1995 (“PSLRA”), 15 U.S.C. § 78u-4(a)(3)(B), for an Order appointing Movant as Lead Plaintiff on behalf of itself and all others similarly situated who purchased or otherwise acquired the common stock of HQ Sustainable Maritime Industries, Inc. (“HQS” or the “Company”) between

May 11, 2009 and April 1, 2011, inclusive (the “Class Period”). Movant also seeks appointment of the law firm of Cohen Milstein Sellers & Toll PLLC (“Cohen Milstein”) as Lead Counsel for the Class and appointment of the law firm of Keller Rohrbach, L.L.P. (“Keller Rohrbach”) as Liaison Counsel. This Motion is based on the accompanying Memorandum in support thereof and the Declaration of Elizabeth A. Leland filed herewith.

I. INTRODUCTION

The Trigon Fund’s motion should be granted. As shown below, this motion is timely as it is filed within 60 days of the first published notice of this class action litigation against Defendants. Furthermore, Movant believes that it is the “most adequate plaintiff” within the meaning of the PSLRA because it has the largest financial interest of any Lead Plaintiff movant in the relief sought by the proposed Class and otherwise meets the requirements of Fed. R. Civ. P. 23(a). Movant’s selection of Cohen Milstein as Lead Counsel and Keller Rohrbach as Liaison Counsel should also be approved, as each of the firms has substantial experience prosecuting securities class action litigation.

II. SUMMARY OF THE ALLEGATIONS AGAINST THE DEFENDANTS

The Complaint filed in this litigation charges HQS and certain of its officers and executives (“Defendants”) with violations of the Exchange Act. HQS describes itself as “an integrated aquaculture and aquatic product processing company, with operations based in the environmentally pristine island province of Hainan, in China’s South Sea.”

The Complaint alleges that, throughout the Class Period, Defendants failed to disclose material adverse facts about the Company’s true financial condition, business and prospects. Specifically, the Complaint alleges: (i) that a substantial portion of the Company’s revenues were overstated; (ii) that HQS’ financial statements were not fairly presented in conformity with U.S.

1 Generally Accepted Accounting Principles and were materially false and misleading; (iii) that
 2 HQS was operating with material deficiencies in its system of internal control over its financial
 3 reporting; and (iv) that, based on the foregoing, the Defendants lacked any reasonable basis for
 4 their positive statements about the Company, its prospects, and its growth.

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 6 On March 16, 2011, the Company announced in a press release that it would file a
 7 Notification of Late Filing on Form 12b-25 with the SEC, allowing it to postpone the filing of its
 8 annual report on Form 10-K for fifteen calendar days, or until April 1, 2011. The Company
 9 disclosed that it “fully expected” to file the Form 10-K by the April 1, 2011 deadline.

10 After the close of the market on April 1, 2011, investors were shocked to discover that
 11 HQS was still out of compliance with federal laws and AMEX listing standards, causing trading
 12 in the Company’s shares to be suspended by the AMEX. HQS shares closed trading on April 1,
 13 2011 at \$2.78 per share. The Company’s shares were then suspended from further trading, and
 14 have not resumed trading since.

15
 16 On April 6, 2011, following the end of the Class Period, the Chairman of the Company’s
 17 audit committee, Andrew Intrader, resigned from the Board and the audit committee in a letter to
 18 the Company’s CEO, stating:

19 As you are aware, over the last few weeks issues have been raised
 20 during the audit process focusing on difficulties in verifying
 21 information relating to company accounts and customer positions.
 22 During that time, the audit committee has asked repeatedly that
 23 management cooperate with the audit process and provide the
 24 requested information and verifications on terms that were
 25 acceptable to both the auditors and company management. Those
 26 efforts were met with delay and resistance. While some steps
 were taken to address the situation, they were insufficient to
 resolve the issues. ... Accordingly, I am compelled by conscience
 to resign from the board of directors and the audit committee,
 effective immediately.

1 Also in his letter, Intrader noted that the Company had failed to file a claim with its
 2 directors' and officers' liability insurance policy, presumably to address misconduct by certain
 3 officers and directors. The Company's legal counsel, Troutman Sanders, was so concerned
 4 about this misconduct that it withdrew from representing HQS.

5
 6 On April 7 and 13, 2011, HQS received notifications from AMEX stating that the
 7 Company was not in compliance with listing standards because it had not filed its annual report
 8 with the SEC and because Intrader had resigned, and that the Company's stock would be
 9 suspended from trading if HQS did not meet certain conditions.

10 On June 2, 2011, HQS disclosed in a Form 8-K filed with the SEC that its auditor,
 11 Schwartz Levitsky Feldman LLP ("SLF"), had resigned. Shockingly, HQS disclosed that SLF
 12 "was not licensed to provide auditing services" in China. SLF wrote to the remaining members
 13 of the Company's audit committee in response to this statement, however, giving a different
 14 reason for its resignation. According to SLF, it had resigned because it "could no longer rely
 15 upon the representations of HQ's management." To date, the Company has not yet appointed a
 16 new auditor, making it unlikely that the Company will file its delinquent financial statements or
 17 that the stock will resume trading in the near future.

18 **III. THE TRIGON FUND SHOULD BE APPOINTED LEAD PLAINTIFF**

19 **A. The Procedure for Appointment of Lead Plaintiff Under the PSLRA**

20 The PSLRA sets forth the procedure governing the appointment of lead plaintiff in each
 21 private action arising under the Exchange Act that is brought as a plaintiff class action pursuant
 22 to the Federal Rules of Civil Procedure. *See* 15 U.S.C. § 78u-4(a)(1). Under the first step of this
 23 procedure, the plaintiff who files a putative class action under the Act must publish a notice
 24 advising members of the purported plaintiff class of the: (i) pendency of the action; (ii) claims
 25
 26

1 asserted therein; (iii) purported class period; and (iv) option of any member of the purported
 2 class to move to serve as lead plaintiff of the purported class not later than 60 days after the date
 3 on which the notice is published. *See* 15 U.S.C. § 78u-4(a)(3)(A).

4 Under the PSLRA, the Court is then required to appoint as lead plaintiff the “most
 5 adequate plaintiff,” which the PSLRA defines as “the member or members of the purported
 6 plaintiff class that the court determines to be most capable of adequately representing the
 7 interests of class members.” *See* 15 U.S.C. § 78u-4(a)(3)(B)(i). The PSLRA further provides:

9 [T]he court shall adopt a presumption that the most adequate plaintiff in any
 10 private action arising under this subchapter is the person or group of persons that:

11 (aa) has either filed the complaint or made a motion in response to a notice
 under subparagraph (A)(i);

12 (bb) in the determination of the court, has the largest financial interest in
 13 the relief sought by the class; and

14 (cc) otherwise satisfies the requirements of Rule 23 of the Federal Rules of
 15 Civil Procedure.

16 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).¹ *See Armour v. Network Assocs.*, 171 F. Supp. 2d 1044, 1048
 17 (N.D. Cal. 2001); *see also In re Cavanaugh*, 306 F.3d 726, 729-30 (9th Cir. 2002).

18 **B. The Notice Requirements Under the PSLRA Have Been Satisfied**

19 The notice requirements set forth in the PSLRA have been satisfied. On April 28, 2011,
 20 counsel for Plaintiff Moomjy caused a notice to be published that advised purchasers of HQS
 21 securities of (i) the pendency of a securities class action against defendants; (ii) the claims
 22 asserted; (iii) the purported class period in that litigation; and (iv) the right of any member of the
 23

24 ¹ Pursuant to the PSLRA, the:

25 presumption [of the plaintiff with the largest loss being lead plaintiff] may be rebutted only upon proof by a
 member of the purported plaintiff class that the presumptively most adequate plaintiff:

26 (aa) will not fairly and adequately protect the interests of the class; or

(bb) is subject to unique defenses that render such plaintiff incapable of adequately representing the class.

15 U.S.C. § 78u-4(a)(3)(B)(iii)(II).

purported class to move the court to serve as lead plaintiff within sixty days (the “Notice”).²
Cf. In re Nice Sys. Sec. Litig., 188 F.R.D. 206, 216 (D.N.J. 1999); *In re Milestone Scientific Sec. Litig.*, 183 F.R.D. 404, 413 (D.N.J. 1998); *Greebel v. FTP Software, Inc.*, 939 F. Supp. 57, 62-63 (D. Mass. 1996).

C. The Trigon Fund Has the Largest Financial Interest in the Relief Sought By the Class

The Trigon Fund believes that it has “the largest financial interest in the relief sought by the class” within the meaning of the PSLRA. According to the information provided in its Certification (*see* Leland Decl. Ex. B), the Trigon Fund purchased 894,044 shares of HQS during the Class Period for \$4,168,336. The Trigon Fund suffered estimated losses of \$1,476,735 using a loss price of \$2.78, the last price at which HQS common stock traded. Using a loss price of zero – which assumes that the Company’s stock never trades again and is therefore valueless – the Trigon Fund suffered estimated losses of \$3,536,968.³ Movant knows of no other persons who have sought to be Lead Plaintiff in this action who possess a larger financial interest.

D. The Trigon Fund Has Satisfied the Other Requirements of the PSLRA

The Trigon Fund has satisfied each of the other requirements of the PSLRA. First, it has signed a Certification, under oath, which:

- (i) states that it reviewed the Complaint;
- (ii) states that it did not purchase the securities of HQS at the direction of plaintiff’s counsel or in order to participate in any private action arising under the federal securities laws;

² A copy of the Notice is attached as Exhibit A to the Declaration of Elizabeth A. Leland in Support of the Trigon Emerging Agri-Sector Fund’s Motion for Appointment as Lead Plaintiff and Appointment of Lead Counsel (“Leland Decl.”).

³ Trigon purchased HQS common stock in its own name. Trigon itself, moreover, suffered the losses complained of and has standing to pursue the claims alleged. *See* Declaration of Heiti Riisberg in Support of the Trigon Emerging Agri-Sector Fund’s Motion for Appointment as Lead Plaintiff and Appointment of Lead Counsel (attached to the Leland Decl. as Ex. C) (“Riisberg Decl.”), at ¶ 3.

(iii) states that it is willing to serve as a representative party on behalf of a class, including providing testimony at deposition and trial, if necessary;

(iv) sets forth all of its transactions in the securities of HQS during the Class Period;

(v) states that it has not sought to serve, nor has it served, as a representative party on behalf of a class in any private federal securities action; and

(vi) states that it will not accept any payment for serving as a representative party on behalf of the class beyond its *pro rata* share of any recovery.

See 15 U.S.C. § 78u-4(a). Movant has also satisfied the PSLRA by moving for appointment as lead plaintiff within sixty (60) days after the date on which the Notice was first published. *See id.*

Second, the Trigon Fund satisfies the requirements of Fed. R. Civ. P. 23. *See* 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I). Rule 23(a) is satisfied for the purposes of this motion where (i) the claims of the proposed lead plaintiff are typical of the claims of the class; and (ii) the proposed lead plaintiff will fairly and adequately protect the interests of the class. *Armour*, 171 F. Supp. 2d at 1051.⁴

The Trigon Fund satisfies the “typicality” and “adequacy” requirements of Rule 23(a). Under Rule 23(a)(3), the “typicality” requirement is satisfied where the claims of the proposed class representative arise from the same course of conduct that gives rise to the other class members’ claims, where these claims are based on the same legal theory, and where the class members and proposed class representative were injured by the same conduct. *See Armour*, 171

⁴ Although there are two other requirements under Fed. R. Civ. P. 23(a) – that the class be so numerous that the joinder of all members is impracticable (Fed. R. Civ. P. 23(a)(1)) and that there be questions of law or fact common to the class (Fed. R. Civ. P. 23(a)(2)) – “[t]ypicality and adequacy of representation are the only provisions relevant to a determination of lead plaintiff under the PSLRA.” *In re Oxford Health Plans, Inc. Sec. Litig.*, 182 F.R.D. 42, 49 (S.D.N.Y. 1998).

1 F. Supp. 2d at 1052 (citing *Hannon v. Dataprods. Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)).
 2 The “adequacy” requirement of Rule 23(a)(4) is satisfied when the proposed class representative
 3 does not have interests antagonistic to the proposed class, and where the proposed class
 4 representative has retained experienced and capable counsel. *In re Emulex Corp. Sec. Litig.*, 210
 5 F.R.D. 717, 720 (C.D. Cal. 2002).
 6

7 In this action, the Trigon Fund’s claims are typical of the claims of all Class members.
 8 Like all Class members, the Trigon Fund suffered damages from its purchases of HQS securities
 9 as a result of Defendants’ false and misleading representations concerning the Company in
 10 violation of the Exchange Act. Furthermore, the Trigon Fund’s interests are clearly aligned with
 11 those of the members of the Class, and there is no evidence of any antagonism between the
 12 Trigon Fund’s interests and those of the Class. In addition, Movant understands its obligations
 13 as Lead Plaintiff and is prepared to act as a fiduciary on behalf of the Class and to vigorously
 14 prosecute this case on behalf of the Class. *See* Riisberg Decl. at ¶ 4.⁵ Also, Movant’s counsel
 15 will vigorously seek to protect the interests of the Class. All these factors demonstrate that
 16 Movant’s claims are typical of the claims of the Class within the meaning of Rule 23(a)(3), and
 17 that it will fairly and adequately represent the interests of the Class under Rule 23(a)(4).
 18

19 **IV. THE COURT SHOULD APPROVE MOVANT’S CHOICE OF COUNSEL**

20 The PSLRA expressly provides that the “most adequate plaintiff shall, subject to the
 21 approval of the court, select and retain counsel to represent the class.” 15 U.S.C. § 78u-
 22 4(a)(3)(B)(v). The Trigon Fund has selected Cohen Milstein as Lead Counsel because of its
 23

24 ⁵ Even after the Supreme Court’s decision in *Morrison v. Nat’l Australia Bank Ltd.*, --- U.S. ---, 130 S. Ct. 2869
 25 (2010), courts regularly appoint foreign institutions to serve as lead plaintiffs in securities class actions. *See, e.g.,*
 26 *Foley v. Transocean Ltd.*, 272 F.R.D. 126, 133-34 (S.D.N.Y. 2011) (holding that “nothing in [*Morrison*] provides
 any support for the notion that foreign investors are not adequate plaintiffs in United States courts when the
 securities at issue were purchased on a United States exchange,” and appointing a Danish pension fund lead
 plaintiff).

1 extensive experience litigating securities class actions, in particular against companies, like HQS,
 2 with operations in China. *See* Riisberg Decl. at ¶ 5. The Court should therefore appoint Cohen
 3 Milstein as Lead Counsel.⁶ The Court should also appoint Keller Rohrbach as Liaison Counsel.
 4 Both firms have the expertise and resources to effectively litigate this case on behalf of the Class.
 5 *See* Cohen Milstein and Keller Rohrbach firm resumes, Leland Decl. Exs. D and E. Thus, the
 6 Court may be assured that the members of the Class will receive the highest caliber of legal
 7 representation.
 8

9 V. CONCLUSION

10 For the foregoing reasons, the Trigon Fund respectfully requests that this Court appoint it
 11 to serve as Lead Plaintiff and approve its selection of Cohen Milstein as Lead Counsel and Keller
 12 Rohrbach as Liaison Counsel.
 13

14 DATED this 27th day of June, 2011.

15 KELLER ROHRBACK L.L.P.

16 /s/ Elizabeth A. Leland

17 Lynn Lincoln Sarko, WSBA # 16569

18 Juli E. Farris, WSBA #17593

19 Elizabeth A. Leland, WSBA # 23433

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23 *Proposed Liaison Counsel*

24
 25
 26 ⁶ Indeed, Cohen Milstein has been appointed to serve as lead counsel in securities class actions in this District. *See, e.g., In re Washington Mutual Mortgage-Backed Sec. Litig.*, No. 09-0037 MJP (Pechman, J.); *Fouad v. Isilon Sys., Inc.*, No. 07-1764 MJP (Pechman, J.).

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2011, I electronically filed the

MOTION OF THE TRIGON EMERGING AGRI-SECTOR FUND FOR APPOINTMENT AS LEAD PLAINTIFF AND APPOINTMENT OF LEAD COUNSEL; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF;

DECLARATION OF ELIZABETH A. LELAND IN SUPPORT OF THE MOTION OF THE TRIGON EMERGING AGRI-SECTOR FUND FOR APPOINTMENT AS LEAD PLAINTIFF AND APPOINTMENT OF LEAD COUNSEL; and

[PROPOSED] ORDER APPOINTING LEAD PLAINTIFF AND LEAD COUNSEL

with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the email addresses registered, as denoted on the attached list, and I hereby certify that I have caused to be mailed the foregoing document or paper via the United States Postal Service to non CM/ECF participants on the list below:

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MOTION OF THE TRIGON EMERGING AGRI-
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COUNSEL (11-726-RSL) – Page 12

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